Harvey's Wagon Wheel, Inc., d/b/a Harvey's Resort Hotel and Harvey's Inn *and* Industrial, Technical, and Professional Employees Division, National Maritime Union of America, AFL-CIO. Case 32-CA-2687

19 July 1984

DECISION AND ORDER

BY MEMBERS ZIMMERMAN, HUNTER, AND DENNIS

On 8 June 1981 Administrative Law Judge Burton Litvack issued the attached decision. Respondent filed exceptions and a supporting brief, and the General Counsel filed cross-exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] only to the extent consistent with this Decision and Order.

The judge concluded that the Respondent violated Section 8(a)(3) and (1) of the Act by discharging floorman Robert England and Section 8(a)(1) by making certain statements about union activities at a meeting of its floormen. In so doing, the judge first had to determine whether floormen are supervisors within the meaning of Section 2(11) of the Act.[3] The judge found, on the basis of the evidence adduced herein, that floormen are not supervisors. The judge also rejected the Respondent's collateral estoppel claim that he was precluded from considering the merits of whether floormen are supervisors by virtue of the Board's earlier decision to the contrary in *Harvey's Resort Hotel*.[4] For the reasons stated below we find that our earlier decision is controlling on this issue.[5]

The judge determined that he was not bound by our prior decision in *Harvey's Resort Hotel* because the supervisory status of floormen was not actually litigated in that case and because the Respondent raised this issue too late in the instant proceeding. Despite the Board's finding in the earlier decision that two of the Respondent's floormen violated Section 8(a)(1) of the Act, the judge nonetheless found that the issue was not litigated because there neither the decision of the judge nor that of the Board actually analyzed the duties and authority of the floormen. We disagree.

Under the doctrine of collateral estoppel we have consistently refused to permit relitigation of an issue decided in an earlier case. With respect to employment status, the doctrine operates to bar further litigation as long as the identical issue was fully litigated in the earlier case and there has been no significant change in the job involved.[6] On the other hand, if a matter is not actually litigated in the first proceeding, that is, if the answer to a complaint fails to put the matter in issue, then collateral estoppel is inapplicable because the issue is in reality being litigated for the first time in the second proceeding.[7]

Our analysis of the prior case involving this Respondent convinces us that the supervisory status of floormen was fully litigated. Thus, the complaint alleged, and the answer denied, that the two floormen involved were supervisors; the judge's decision specifically included floormen as supervisors in its description of the Respondent's supervisory hierarchy;[8] and the Board adopted this finding without comment. Furthermore, at the outset of the hearing in the prior case, the Respondent refused to stipulate to the supervisory status of the floormen in question. That neither the Board's nor the judge's decision set out the evidence of supervisory status is of no bearing on the question wheth-

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] Based in part on *Essex International*, 211 NLRB 749 (1974), the judge concluded that the Respondent violated Sec. 8(a)(1) of the Act by maintaining an overly broad no-solicitation/no-distribution rule. Regarding the rule's prohibition on solicitation "during working hours and/or time" Members Hunter and Dennis find that the rule violates Sec. 8(a)(1) for the reasons stated by the majority in *Our Way, Inc.*, 268 NLRB 394 (1983), whereas Member Zimmerman relies on his dissent in that case.

In affirming the judge's finding that the Respondent violated Sec. 8(a)(1) by maintaining a rule prohibiting off-duty employees from soliciting or distributing literature on its premises, Member Dennis does not rely on the Board's majority opinion in *The Mandarin*, 221 NLRB 264 (1975), cited by the judge. Instead, Member Dennis relies on former Chairman Murphy's concurring opinion in that case, which later became Board law in *Contra Costa Times*, 225 NLRB 1148 (1976). Members Zimmerman and Hunter find that under either case the rule is unlawful.

In the absence of a background of coercive conduct, we dismiss the allegation that the Respondent violated Sec. 8(a)(1) when Games Manager Briggs told employee Ledbetter that bargaining would start from "scratch" and that "everything" would come from negotiations. See *Host International*, 195 NLRB 348 (1972).

[3] At the hearing the parties stipulated that, if Robert England was an employee, then his discharge was unlawful.

[4] *Harvey's Resort Hotel*, 234 NLRB 152 (1978).

[5] E.g., *Wonder Markets*, 249 NLRB 294 (1980); *Teamsters Local 42 (California Dump Truck Owners Assn.)*, 248 NLRB 808 (1980); *Electrical Workers IBEW Local 3 (New York Telephone)*, 197 NLRB 866 (1972).

[6] *Teamsters Local 42*, supra at 814.

[7] James & Hazard, *Civil Procedure* sec. 11.17 (Little, Brown & Co. 1977).

[8] *Harvey's Resort Hotel*, supra at 155.

er that issue was litigated and determined.[9] What matters is whether the status of floormen was put in issue and resolved in the earlier proceeding and we find that it was. We therefore are precluded from considering the issue now, absent evidence that the floormen's job has changed significantly since the earlier litigation.[10] No such evidence was adduced in the instant proceeding.

Even if all the requirements for collateral estoppel were not met in this case, we would nonetheless find that the Respondent's reliance on the earlier case is justified in view of the striking similarities between the two cases. In the earlier case this same Respondent was charged with violating some of the same provisions of the Act as in this case. The individuals involved in both cases held the job classification of floorman and no contention has been made that a floorman's job has changed in the interval between the two proceedings. Nevertheless, in the earlier case the two floormen were found to be supervisors whereas in this case floormen are alleged to be employees. It is also noteworthy that Pederson, the Respondent's manager who made the remarks to floormen in this case, testified in the earlier case. Under these circumstances a party to a prior decision should be able to rely on that decision with confidence.[11] Accordingly, we find that the Respondent was justified in relying on the finding in our prior decision that its supervisory hierarchy included floormen.[12] We shall therefore dismiss the complaint insofar as it alleges that the Respondent violated the Act either by discharging its floorman England or by its statements to the floormen as a group.

CONCLUSIONS OF LAW

1. The Respondent, Harvey's Wagon Wheel, Inc., d/b/a Harvey's Resort Hotel and Harvey's Inn, is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By maintaining in effect an invalid no-solicitation/no-distribution rule, the Respondent interfered with, restrained, and coerced employees in the exercise of their rights guaranteed by Section 7 of the Act, and thereby committed an unfair labor practice within the meaning of Section 8(a)(1) of the Act.

4. Except as found herein, the Respondent has not otherwise violated the Act.

ORDER

The National Labor Relations Board orders that the Respondent, Harvey's Wagon Wheel, Inc., d/b/a Harvey's Resort Hotel and Harvey's Inn, Stateline, Nevada, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining in effect any rule prohibiting employees from soliciting during their nonworking time or prohibiting off-duty employees from soliciting or distributing literature on its premises.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Post at its Stateline, Nevada facilities copies of the attached notice marked "Appendix."[13] Copies of the notice, on forms provided by the Regional Director for Region 32, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[9] The transcript suggests that the Respondent simply decided not to seriously challenge the allegation that some of its floormen were supervisors. Although the Respondent's attorney refused to stipulate to the supervisory status of the alleged supervisors, he agreed to "short-cut it so we waste no more time."

[10] *Teamsters Local 42*, supra at 814.

[11] Cf. *Transportation Enterprises v. NLRB*, 630 F.2d 421, 426 (5th Cir. 1980).

[12] In view of our resolution of the supervisory status of the Respondent's floormen, we find it unnecessary to pass on the judge's discussion of *Cato Show Printing Co.*, 219 NLRB 739 (1975), and the general issue of whether a respondent's honest but mistaken belief as to the supervisory status of certain individuals is a defense to an unfair labor practice allegation.

[13] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT maintain in effect any rule prohibiting employees from soliciting during their nonworking time or prohibiting off-duty employees from soliciting or distributing literature on our premises.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

HARVEY'S WAGON WHEEL, INC., D/B/A HARVEY'S RESORT HOTEL AND HARVEY'S INN

DECISION

STATEMENT OF THE CASE

BURTON LITVACK, Administrative Law Judge. This matter was heard before me in Carson City, Nevada, on November 4 and 13, 1980. On June 20, 1980,[1] the Regional Director for Region 32 of the National Labor Relations Board (the Board) issued a complaint, based on an unfair labor practice charge filed on April 25 by Industrial, Technical and Professional Employees Division, National Maritime Union of America, AFL-CIO) (the Union) alleging that Harvey's Wagon Wheel, Inc., d/b/a Harvey's Resort Hotel and Harvey's Inn[2] (Respondent), engaged in acts and conduct violative of Section 8(a)(1) and (3) of the National Labor Relations Act (the Act). Respondent filed an answer, denying the commission of any unfair labor practices.

All parties have been afforded full opportunity to introduce relevant evidence, to examine and cross-examine witnesses, and to file briefs, which have been carefully examined. The main issue herein concerns the supervisory status of certain employees who are classified as floormen or dual-rated floormen.[3] Unfortunately, the record contains significant but conflicting testimony concerning the duties and responsibilities of these individuals. Analysis of the entire record and my observation of their demeanor while testifying convince me that some witnesses either falsely diminished or exaggerated the job duties of the floormen. Accordingly, my conclusions on this issue are, in large measure, based on what testimony I deemed most credible—notwithstanding that such involved crediting portions and discrediting other sections of witnesses' testimony.[4] Therefore, based on the entire record, the posthearing briefs, and on my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

At all times material herein, Respondent, a Nevada corporation with an office and place of business in Stateline, Nevada, has been engaged in the business of operating a hotel, gambling casinos, and related facilities. During the 12-month period preceding the issuance of the complaint, Respondent, in the normal course and conduct of its business operations, derived gross revenues in excess of $500,000 and purchased and received goods and products valued in excess of $50,000 directly from suppliers located outside the State of Nevada. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

Respondent admits, and I find, that the Union is now, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

III. ISSUES

1. Are Respondent's employees who are classified as floormen or dual-rated floormen supervisors within the meaning of Section 2(11) of the Act?

2. On or about April 18, did Respondent terminate employee Robert England, dual-rated floorman, in violation of Section 8(a)(1) and (3) of the Act?

3. At all times material herein, has Respondent violated Section 8(a)(1) of the Act by maintaining and enforcing an invalid no-solicitation/no-distribution rule?

4. On or about April 19, did Respondent engage in conduct violative of Section 8(a)(1) of the Act by:

(a) Telling employees who were classified as floormen that another employee had been discharged for engaging in union activities.

(b) Admonishing employees who were classified as floormen not to discuss the Union or to attend union meetings.

(c) Instructing employees who were classified as floormen not to converse with another employee because of the latter's prounion sympathies.

(d) Creating the impression that it was engaging in surveillance of its employees' union activities.

(e) Attempting to convert employees who were classified as floormen into statutory supervisors.

5. On or about April 20, did Respondent violate Section 8(a)(1) of the Act by threatening to terminate an employee because of his union activities?

6. On or about April 20, did Respondent violate Section 8(a)(1) of the Act by indicating to an employee the futility of engaging in acts on behalf of the Union?

IV. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

Respondent is involved in the gaming industry in the State of Nevada, maintaining two gambling establishments, Harvey's Resort Hotel (the Hotel) and Harvey's

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[1] Unless otherwise stated, all events herein occurred in 1980.

[2] The complaint and other formal papers were amended at the hearing to reflect the correct name of Respondent.

[3] The duties and responsibilities of employees in both classifications are identical except that dual-rated floormen may be scheduled to deal.

[4] The crediting of portions of witnesses' testimony is required under the circumstances of this case and does not require rejection of their entire testimony. *Carolina Canners*, 213 NLRB 37 (1974). "Nothing is more common than to believe some and not all of what a witness says." *Edwards Transportation Co.*, 187 NLRB 3, 4 (1970), enfd. 437 F.2d 502 (5th Cir. 1971).

Inn (the Inn) in Stateline, Nevada, which is located on Lake Tahoe. The two facilities are located approximately 1-1/2 miles apart, and employees of the Hotel, which is significantly larger, are regularly scheduled for work at the Inn on a rotating basis. Harvey Gross is Respondent's chairman of its board of directors; Eldon Campbell is the corporate president; and Jack Morgan is vice president in charge of casino operations. With regard to the supervisorial hierarchy at the Hotel, beneath Morgan are three club shift managers, one of whom is on duty during each work shift.[5] These individuals report directly to Morgan, are responsible for the overall operation of the Hotel's casino, hotel, and food departments on their respective shifts, and replace Morgan whenever necessary. Within the casino, there are games, slot machines, and a bar area, with a manager and an assistant responsible for each facet on each shift. Thus, there are four games managers, including a relief manager, and four assistant games managers, who are also known as "number-two" men or "pencil" men.

The casino gaming area in the Hotel is artificially divided into seven separate sections or "pits," wherein the gaming tables are located. The size of the pits varies from 6 roulette, craps, and twenty-one or blackjack tables to 22 such tables in the main pit. In charge of each pit is an individual classified as a pit supervisor.[6] Beneath these individuals in each pit—and on occasion substituting for the pit supervisors—are employees classified as floormen. There are from one to four floormen in a pit depending on the number of tables open. Finally, each game is operated by a dealer. In the main pit, the maximum number of dealers on duty can be 30, including 8 relief dealers.

B. *The Discharge of Robert England and the Supervisory Status of Floormen*

Robert England was initially employed by Respondent from May 1968 until July 1973 as a parking attendant and a dealer. He was rehired in May 1975 as a dealer and, for approximately 2-1/2 years prior to his discharge on April 18, England worked as a floorman and dual-rated floorman.[7] The record establishes that the Union commenced an organizational campaign at the Hotel and the Inn in March and that such continued through April. At the hearing, the parties stipulated that "Respondent discharged Robert England . . . because [he] joined or assisted the Union or engaged in other protected, concerted activities for the purposes of collective bargaining or other mutual aid or protection." Conceding that the discharge of England would have been violative of Section 8(a)(1) and (3) of the Act had he been an employee, Respondent asserts that floormen and dual-rated floormen are supervisors within the meaning of Section 2(11) of the Act; that the discharge of England resulted from his having engaged in activities inconsistent with his position as a supervisor; and that, in such circumstances, England's discharge may not be found to have been violative of the Act. Contrary to Respondent, counsel for the General Counsel argues that "England was not a supervisor, but rather an employee as defined in Section 2(3) of the Act, and that, therefore, his discharge violated Section 8(a)(1) and (3) of the Act." Accordingly, as England was employed as a dual-rated floorman at the time of his discharge and as postulated by the parties, the legality of his termination solely depends on whether individuals in said job classification are supervisors within the meaning of the Act.

As defined by Section 2(11) of the Act, a supervisor is "any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action . . . ." As stated by the Board, it is not necessary that an individual possess all of these powers. Rather, "possession of any one of these enumerated powers establishes supervisory status, as the section is read in the disjunctive." *Flexi-Van Service Center*, 228 NLRB 956, 960 (1977). "However, possession, alone, of one of these powers does not suffice to confer supervisory status. Rather, supervisory status exists only if the power is exercised with independent judgment on behalf of management, and not in a routine or clerical manner." *Hydro Conduit Corp.*, 254 NLRB 433, 436 (1981). Where the possession of any one of the aforementioned powers is not conclusively established or nonexistent, the Board looks to certain other factors, including the individual's job title or designation as a supervisor, attendance at supervisory meetings, job responsibility, authority to grant time off, responsibility for reporting rule infractions, and the ratio of supervisors to employees. *Monarch Federal Savings & Loan*, 237 NLRB 844, 845 (1978); *Flexi-Van*, supra. As to the burden of proof in establishing supervisory status, "the burden is on the party alleging supervisory status to prove that it, in fact, exists . . . ." *Commercial Movers*, 240 NLRB 288, 290 (1979). Finally, in making determinations regarding such status, "the Board has a duty to employees to be alert not to construe supervisory status too broadly because the employee who is [so deemed] is denied employee rights which the Act is intended to protect." *Westinghouse Electric Corp. v. NLRB*, 424 F.2d 1151, 1158 (7th Cir. 1970), cert. denied 400 U.S. 831.

While significant aspects of the authority of Respondent's floormen are in dispute, there is a substantial agreement concerning their actual job duties. Thus, on any given shift, a floorman is responsible for watching over the games in a section of a pit, with the number of tables and dealers dependent on how busy the casino is at the time, but normally totaling approximately 4 to 10 games and 8 or 9 dealers. According to discriminatee England, "As a floorman, your duties are to check to make sure that the dealer was on the games as they were supposed to be. To maintain the game security. To see if the tables need fills at any time. Answer any questions customers may have. Settle any disputes. Coordinate any credit

[5] The Hotel casino operates on a three-shift basis: 12 noon until 8 p.m. (day), 8 p.m. until 4 a.m. (swing), and 4 a.m. to 12 noon (graveyard).

[6] Counsel for the General Counsel concedes that individuals in this classification are supervisors within the meaning of Sec. 2(11) of the Act.

[7] Despite the change in his job classification, England was never assigned to a deal during his employment as a dual-rated floorman, and he continued to perform all the duties of a floorman.

checks with the pit supervisor." Likewise, Jack E. Reynolds, a floorman who was laid off in August after a bomb explosion at the Hotel, testified that his duties were "to open the games, change the cards, make fills, watch . . . that the dealers were following procedure, publicity relations with the customers." Further, Kathy Trupp, who is a dual-rated floorman, and who testified on behalf of Respondent, stated, "I am the immediate supervisor of my area and the dealers and I handle every situation that comes up in that area. I take care of the money and I take care of the customers. I watch the procedure . . . [and] the mistakes, I take care of the discipline that comes up, I am the supervisor." Finally, it appears that floormen are advised at management meetings of personnel policy changes and are required to disseminate this information to the dealers and that, in the absence of a pit supervisor who normally is observing another section of the gambling pit, the floormen, alone, are Respondent's observers over their assigned sections.[8]

With regard to the extent of their authority over the dealers in carrying out the aforementioned duties, the record discloses that floormen have no authority to hire or fire employees, suspend, grant time off, promote, grant raises, reward, transfer, assign overtime, adjust grievances, authorize absences, or to assign work. While floormen are also not authorized to issue written warnings, or "consultations," the record does disclose that said individuals are empowered to—and do—orally reprimand dealers. However, the record further discloses that what verbal reprimands are given to the dealers by floormen normally pertain to improper performance of work. Thus, England credibly testified that, when a dealer was dealing or otherwise operating his or her game in a manner inconsistent with Respondent's practices or when a work rule, such as the dress code, was being violated by a dealer he would discuss the problem with the dealer during a break or, if of a serious nature, immediately at the table, and "I would just make a suggestion as to why I thought they could do it . . . better." Further, according to England, such verbal warnings were not reported or noted in the personnel files, and if the dealer problem was something other than the aforementioned, he would report it to the pit supervisor. Likewise, Reynolds testified that he would only discipline if dealers were not following proper procedures ("I would talk to them and tell them what they were doing wrong. The first opportunity I had I'd correct them.") but that if he encountered a more serious problem, he informed the pit supervisor. Corroborating the others as to the types of disciplinary problems with which she is concerned, current employee Trupp testified that, if the dealer refuses to follow her discipline or if the matter is a continuing difficulty, she reports the problem to the pit supervisor for resolution. The Board has long held that, absent some showing of impact on employees' job status, verbal reprimands do not constitute "discipline" within the meaning of Section 2(11) of the Act. *Hydro Conduit Corp.*, supra at 437; *John Cuneo of Oklahoma*, 238 NLRB 1438 (1978). Moreover, it appears that the type of discipline imposed by the floormen herein involves work-related matters and does not involve the employment status of the dealers. *John Cuneo*, supra at 1439; *Westlake United Corp.*, 236 NLRB 1114, 1116 (1978). In fact, it appears that, if the dealer difficulties are of a serious nature, these must be reported to the pit supervisor for ultimate resolution. *Winco Petroleum Co.*, 241 NLRB 1118, 1121 (1979). Accordingly, the minor work-related reprimands, which are herein involved, cannot serve to establish the authority to discipline–essential for the finding of supervisorial authority within the meaning of Section 2(11) of the Act. *Hydro Conduit*, supra.

Finally with regard to employee discipline, while the record is clear that floormen are not authorized to issue employee "consultations," there is some dispute over the issuance of written warnings which are authorized from the "sky," the security agents who observe casino games through two-way mirrors from rooms above the ceiling. According to Kathy Trupp, "[W]hen they call down on a procedure and you have a consultation with the dealer, you tell them what the infraction was and they give their explanation, they write their comment and sign their name to it." While Trupp conveyed the impression that floormen played a greater role than in normal discipline situations, I found much more persuasive the testimony of England, who denied the existence of discretion: "[T]hey just informed us what the infraction was and we wrote it down and confronted the dealer with it." Crediting England, I find this disciplinary procedure to be essentially ministerial in nature and not rising to the level of that required for a finding of supervisorial status. *Silver Spur Casino*, 192 NLRB 1124, 1125 (1971) (Floormen).

While there is no dispute that floormen cannot independently exercise any of the powers enumerated in Section 2(11) of the Act, there is conflicting testimony as to whether floormen do, in fact, regularly recommend said employee actions. Thus, while admitting that he recommended that his ex-wife and sister-in-law be hired (without success) and that he once recommended that a dealer, Andy Loulis, be given a raise, which request was denied by management, England testified that he never otherwise recommended that any dealer be hired, fired,

[8] Analysis of the record and the posthearing arguments in the briefs discloses that the job duties and authority of the floormen relate both to the dealers and to the general public. The record establishes that, with regard to the latter, floormen exercise independent judgment in granting free drinks to customers, settling betting and other disputes between customers and dealers, ordering fills (chips) and money for the tables, and watching the keno and other games at the Inn. While Respondent emphasizes this aspect of the duties of floormen in arguing that they exercise supervisory authority, I do not consider such to be particularly relevant to the issue of their status as statutory supervisors within the meaning of Sec. 2(11) of the Act. Thus, this issue relates solely to the standards set forth in that provision and the secondary indicia established by the Board and concerns the alleged supervisor's authority to effect the terms and conditions of employment and job tenure of employees being directed. *Columbia Engineers International*, 249 NLRB 1023, 1030 fn. 11 (1980); *Golden West Broadcasters-KTLA*, 215 NLRB 760, 762 fn. 4 (1974). Accordingly, when considered in this light, the authority of floormen in dealing with the public has nothing whatsoever to do with the employer-employee relationship, which is contemplated under Sec. 2(11).

laid off, suspended, promoted,[9] rewarded, or given a raise. Likewise, other than on one occasion unsuccessfully recommending that his son be hired, on another informing, without any resulting action, his pit supervisor that a dealer was not a good employee, and once, without effect, recommending that a craps dealer be promoted, according to ex-floorman Jack Reynolds, he never recommended that employees be hired, fired, transferred, suspended, laid off, rewarded, or given a raise. Contrast the aforementioned testimony with that of floorman Michael Hines, who also testified on behalf of the General Counsel. Hines credibly testified that, as a floorman, he is authorized to recommend that employees be hired, fired, given raises, and promoted, that he knows said recommendations have been effective inasmuch as "I don't make that many, anyway," that all floormen possess similar authority, and that he regularly has observed other floormen recommending raises or discipline.[10] Finally, Kathy Trupp testified that she regularly recommends discipline and other personnel actions and "most of it was carried through." More specifically, Trupp stated that she has recommended approximately 20 employees for merit raises and that only one such recommendation was not ultimately followed. The entire record herein convinces me that witnesses England and Reynolds falsely diminished and understated the role of floormen in recommending employment actions and, in this regard, I credit the more realistic testimony of Hines and Trupp.

However, it is gainsaid that whether an individual's authority to recommend personnel actions confers supervisorial status depends on the effectiveness of said recommendation. *A. Barton Hepburn Hospital*, 238 NLRB 95, 96 (1978). In other words, if the alleged supervisor's superior conducts an independent investigation rather than relying on the word of that individual, it can hardly be said that the recommendation is effective. *Vapor Corp.*, 242 NLRB 776 (1979). Respondent argues that its floormen effectively recommend employee actions: namely, discipline and pay increases. As to the former, Kathy Trupp testified that, on occasion, she has recommended discipline after reporting to her pit supervisor that a dealer has ignored a warning or has done something more serious. After listening to her, the pit supervisor "would get the employee and get his side of the story and then generally it was taken to the club manager and everyone went upstairs to talk about it." Trupp reiterated that the pit supervisor would not act merely on her word but rather would conduct his own investigation. Concerning employee raises, Trupp testified that she would make recommendations for merit raises to her pit supervisor or the assistant games manager. Thereupon, the games manager or his assistant completes an employee evaluation form, utilizing input from various sources, including Trupp. From this, it is evident that pit supervisors and higher management officials independently evaluate the reports and recommendations of Trupp and other floormen in order to determine the course of action to be taken. Consequently, it cannot be established that the disciplinary and raise recommendations of floormen are effective within the meaning of Section 2(11) of the Act inasmuch as said actions are the focus of further independent investigation. *Loffland Bros. Co.*, 243 NLRB 74, 75 (1979); *Vapor Corp.*, supra. Finally, the foregoing establishes the lack of authority to effectively recommend notwithstanding the fact that almost all disciplinary and pay raise recommendations may ultimately be followed. *Victory Electric Cooperative Assn.*, 230 NLRB 1201 (1977).

Next in support of its argument that floormen are supervisors within the meaning of the Act, Respondent argues—and the record establishes—that these individuals substitute for pit supervisors on a regular basis. However, as stated by the Board, "mere substitution for a supervisor without the exercise of supervisory authority does not confer supervisory status." *Fred Rogers Co.*, 226 NLRB 1160, 1161 (1976). The testimony is contradictory on this point. Thus, Jack Reynolds testified that when he acted as pit supervisor, "I would have to check with the assistant games manager if I wanted to make any kind of a decision of any importance." Corroborating him, England stated that the extent of his authority did not change when he became an acting pit supervisor and that he could "call the assistant games manager" if any matters arose which normally only the pit supervisor could resolve. Contrary to the General Counsel's witnesses, those testifying on behalf of Respondent claimed that the authority of the pit supervisor accompanied the title whenever floormen acted in that capacity. Thus, Club Shift Manager David Pederson testified that, on such occasions, the floorman "is responsible for the whole operation of the pit," and that there is "no difference" between a pit supervisor and a floorman who is acting as a pit supervisor in terms of duties and responsibilities. Likewise, Kathy Trupp testified that she has so acted "many times" and that on those occasions "the final decision in a lot of things I would do as a pit supervisor that I wouldn't do as a floorman. . . . I just do them and I don't have to tell anyone that I have done it."

Based on the record as a whole, I believe that both Pederson and Trupp exaggerated the authority of floormen when substituting for pit supervisors. Thus, each could recall just one employee-related example of the enhanced authority of floormen in such situations and analysis of even these fails to establish the sort of supervisorial authority encompassed by Section 2(11) of the Act. During his testimony, Pederson identified a series of employee appraisal forms, Respondent Exhibits 3(a) through 3(k), which are utilized by Respondent in determining

[9] England averred that "there were a couple of craps dealers . . . that said they were interested in [higher positions] . . . and I relayed this informations on up . . . ." He also recalled that the dealers were ultimately not promoted.

[10] Attempting to impeach her own witness, counsel for the General Counsel offered Hines' pretrial affidavit wherein he stated, "Floormen supervise several tables and correct any gaming mistakes we see. I have no authority to hire, fire, promote, or discipline anyone. I could recommend such actions, but never have. I have recommended raises for dealers and the raise has been approved. I once recommended a dealer for promotion." Hines testified, without contradiction, that he recommended that a person be fired and that another be promoted subsequent to the taking of the affidavit and that said recommendations were ultimately adopted by Respondent. I do not believe that counsel for the General Counsel successfully impeached the testimony of Hines, whose testimony was consistent with his affidavit.

whether employees deserve merit raises, and which were signed by floormen, who were acting as pit supervisors at the time. Offered to show "that floor persons are involved in the evaluation process," there was no testimony—and such cannot be established from the documents themselves—as to the circumstances under which floormen signed the appraisal forms or as to what specific input, if any, the floormen contributed to the evaluations of each individual employee. In these circumstances, the extent of the floormen's participation in these personnel evaluations remains speculative and, at best, problematical, and it can hardly be said that merely signing an employee appraisal, in place of the pit supervisor, satisfies the requirements for establishing a statutory supervisor within the meaning of Section 2(11). In support of her testimony, Trupp related an incident wherein she ordered employee Jerry Haskell away from a craps game and reprimanded him over a dispute with a customer. The following colloquy then ensued:

> JUDGE LITVACK: What did you do to Mr. Haskell that you couldn't have done as just an ordinary—
>
> THE WITNESS: Nothing. I would have done the same thing as a floorman, talked to him.
>
> JUDGE LITVACK: Okay. So in other words, in that sense what you did was the same.
>
> THE WITNESS: Right.

Accordingly, I do not credit the testimony of either Pederson or Trupp as to the greater authority of floormen when acting as pit supervisors and find that the record does not support or warrant the conclusion that, in said circumstances, floormen possess and exercise supervisory authority within the meaning of Section 2(11) of the Act. The mere fact that floormen assume the title of pit supervisor, without more, does not vest them with the status of statutory supervisors. *Boston Store*, 221 NLRB 1126, 1127 (1975).

Also in this regard, the record establishes that, when working in their normal capacity at the Inn, for a period of time until approximately 12 noon each day, floormen are alone in charge of the only gambling pit at that location. Kathy Trupp testified that she was the one floorman at the Inn for a 6-month period in 1980 and that during the morning hours each day, "I was the acting games manager." According to Trupp, "I supervised, actually, the whole casino. I had to sign for slot jackpots, for keno hits, I had to authorize security actions . . . . I ordered all the fills, took care of all the money, did the PR. I was the acting casino manager." Jack Reynolds corroborated Trupp that floormen are alone during the morning hours when working at the Inn and that they are solely responsible for the gaming tables in use during that time period—including the money necessary for operation of the games. However, there is no other record evidence to corroborate the testimony of Trupp regarding a higher job title or increased authority at the Inn. In fact, Pederson, who testified extensively on the alleged supervisorial authority of floormen and who testified subsequent to Trupp, failed to mention any change in the status of floormen while working at the Inn. Further, I note that Trupp was internally contradictory as to her exact job title while on duty during the mornings—lending credence to the impression that said title may have been self-anointed. Moreover, mere possession of that job title, without the authority of the position, does not establish her supervisory status on such occasions. *Boston Store*, supra. Also, Trupp admitted that as "casino manager," she could not hire or fire and did not possess all his authority. Accordingly, the extent of Trupp's authority as "casino manager" is open to doubt, and, in any event, even if such arose to the level contemplated by Section 2(11) of the Act, the exercise of supervisorial authority at the Inn by floormen appears to have been too sporadic in nature to establish supervisory status within the meaning of the Act. *Columbia Engineers International*, supra; *Spector Freight System*, 216 NLRB 551, 554–555 (1975); *Golden West Broadcasters*, 215 NLRB 760 (1974).

Besides the aforementioned, Respondent sets forth other factors which assertedly establish the supervisory status of the floormen. Initially, it is urged that their regular attendance at supervisory meetings, at which personnel-related matters are discussed, suggests that the floormen are, indeed, supervisors. However, the Board has held that attendance at supervisory meetings will not confer supervisory status upon individuals when, as herein, said persons do not exercise any of the indicia of supervisory status as set forth in Section 2(11) of the Act. *Fred Rogers Co.*, supra at 1161. Next, Respondent points to the disparity in wages between floormen and dealers and the facts that, unlike dealers, floormen receive free meals and are not required to wear uniforms. As to wages, while the record establishes that floormen earn $95 per shift and that dealers earn $40 per shift, Kathy Trupp testified that dealers also earn tips which may total as much as $40 per shift. In any event, the fact that an individual earns higher wages than other employees does not alone confer supervisory status. *Fred Rogers Co.*, supra. Further, while it is uncontroverted that floormen receive free meals and are not required to wear uniforms, the record further establishes that floormen and dealers receive identical employee benefits, including holidays and health insurance coverage, and are paid overtime. Respondent next argues that floormen advise and explain to the dealers all changes in policy which pertain to them. While such is, indeed, the case, the record also establishes that floormen act as conduits on these occasions, playing no role in the formulation of the policy changes which they are charged with explaining. Accordingly, such is not sufficient to establish supervisorial authority. *Operating Engineers Local 673 (Westinghouse Electric Corp.)*, 229 NLRB 726 (1977). Finally, the record reveals that the job description for the position of floorman, Respondent's Exhibit 1, states that said individuals "can effectively recommend hiring or firing." Without regard to the job description, there is no such evidence in the record.[11] Moreover, as the Board has

[11] While Trupp testified that she recommended to Vice President Jack Morgan, who is responsible for all hiring, that dealer Brian Banducci be hired and that he was, Trupp further testified that Banducci was first interviewed by Morgan and that she did not participate in the interview.

Continued

stated, "a job description is not determinative of supervisory status. Rather, the question is whether there is evidence that the individual possesses any of the powers enumerated in Section 2(11)." *Western Union Telegraph Co.*, 242 NLRB 825, 826 (1979).

In his posthearing brief, counsel for Respondent argues that "in virtually every case . . . involving gambling casinos," the Board has excluded floormen from bargaining units. In support, he points to five prior decisions, involving the gaming industry, in which floormen were so excluded. However, analysis of these decisions establishes that not one is relevant to the issues in the instant matter and that all are easily distinguishable. Thus, in *Castaways Casino*, 195 NLRB 282 (1972); *Landmark Hotel*, 194 NLRB 815 (1972); and *Harold's Club*, 194 NLRB 13 (1971), the parties stipulated that floormen should be excluded from whatever units were appropriate. Moreover, in *Nevada Club*, 178 NLRB 81 (1969), floormen were excluded from the bargaining unit because they possessed authority to effectively recommend promotions, transfers, and raises and could independently assign work. Id. at 82. Finally, in *El Dorado Club*, 151 NLRB 579 (1965), floormen were excluded as supervisors in one instance because they assigned work to dealers and effectively recommended discharges (id. at 585) and in another in view of their authority to fire employees (id. at 590). As demonstrated above, Respondent's floormen do not effectively recommend employee-related actions and cannot independently exercise the powers set forth in Section 2(11).

Next, counsel for Respondent requests that I take judicial notice of a prior Board decision which involves Respondent and its floormen—*Harvey's Resort Hotel*, 234 NLRB 152 (1978)—and argues that the Board's decision therein is controlling upon the supervisorial status of Respondent's floormen. In that case, which involved unfair labor practice allegations, the Regional Director for Region 32 alleged in his complaint that several of Respondent's floormen were supervisors within the meaning of Section 2(11) of the Act, and the Board ultimately concluded that statements by these individuals were violative of Section 8(a)(1) of the Act. However, contrary to Respondent, while I am perplexed by the Region's apparent lack of consistency and by the failure of Counsel for the General Counsel either to explain this change of position or to even mention the prior decision, I do not find this decision to be controlling. Thus, while Respondent argues that the Board "concluded that floormen . . . working [for Respondent] . . . are supervisors within the meaning of the Act," close scrutiny of the decision of both the Board and the administrative law judge discloses that there was no analysis in either one of the duties and authority of the floormen or, indeed, any litigation of their supervisory status. Rather, such issues, in the first instance, are before me. Moreover, it would seem that this view was shared by counsel for Respondent inasmuch as at the hearing he never once asserted that the prior Board decision was collateral estoppel to the issues herein involved and as he extensively litigated the supervisory status of the floormen. For these reasons, I do not feel bound by the aforementioned prior decision of the Board.

Accordingly, notwithstanding that Respondent's floormen may be "in charge" of certain sections of the gambling pits and the dealers who operate the tables therein, Respondent has not met its burden of proof; nor does the record, as a whole, warrant the conclusion that these individuals are supervisors within the meaning of Section 2(11) of the Act. *Hydro Conduit Corp.*, 254 NLRB 433 (1981); *Silver Spur Casino*, 192 NLRB 1124 (1971). Moreover, inasmuch as Respondent stipulated that Robert England, a dual-rated floorman, was terminated for having engaged in union or other protected concerted activities, I find and conclude that, as an employee within the meaning of Section 2(3) of the Act, he was discharged in violation of Section 8(a)(1) and (3) of the Act.

C. *The April 19 Meeting Conducted by Pederson*

It is uncontroverted that, on the day following its discharge of England, Respondent conducted meetings with the floormen and pit supervisors who work on each shift. Club Shift Manager Pederson conducted the meeting for the day-shift employees, and he testified that the meeting was held for two reasons. "One was about the union activities in the club and the other was our performance evaluations that we were giving at the time, we were doing incorrectly." The General Counsel alleges that several statements which were made by Pederson at the meeting are violative of Section 8(a)(1) of the Act.

Floorman Jack Reynolds attended the meeting and testified that Pederson told the floormen that England had been fired on the day before. Thereupon, a pit supervisor stated that the firing resulted from England's union activities, and Pederson confirmed that such was correct. Next, according to Reynolds,"we were told not to question or talk to any of the employees about the signing up for the Union," and Pederson said unions were corrupt and only interested in the dealers in order to obtain dues. Then, Pederson "mentioned that we were all management and we had the power of being able to hire or fire anybody." Finally, two dual-rated floormen asked if they would be represented by the Union inasmuch as they were dealing. Pederson replied that they were all management. During cross-examination, Reynolds testified that Pederson requested that the floormen not attend an upcoming union meeting so that Respondent would not be accused of spying on the employees. Also, he contradicted himself as to what Pederson said was their authority in regard to hiring and firing: "He said we had the power to *recommend* hiring and firing." (Emphasis added.)

Dual-rated floorman Michael Hines also attended the meeting. According to him, the meeting began with someone asking why England had been fired; someone else answered that such was caused by his union activities; and "Pederson said that's right . . . ." Next, Peder-

Further, while Michael Hines testified that he did recommend that an employee be fired and that within 3 days the person was, in fact, fired, the record is unclear—and Hines had no knowledge—whether any independent investigation was conducted. In these circumstances, the record will not support a conclusion that floormen effectively recommend such actions.

son discussed the job duties of the floormen, telling them "what we already knew," that they had the authority to recommend the hiring, firing, and promoting of employees and to suggest raises.[12] After this, Pederson "said if anybody doesn't know you're not part of management, from now on you do know .'. . ." Pederson then suggested that "it would be a good idea to keep a pad" in their pockets while working[13] and mentioned a union meeting which was to be held at a nearby hotel, stating that the floormen should not attend "so it wouldn't look suspicious . . . [and] they could get back later and say we were spies . . . ." According to Hines, Pederson told the employees that there would be no more dual-rated floorman and that said individuals would no longer deal. Finally, Pederson told the floormen "that management knew who the union supporters were," and he said that "we were not to be seen talking to Pete Boutmy, one of the prounion employees."[14]

Pederson testified about this meeting, corroborating some of the aforementioned testimony. Thus, he admitted informing the assembled employees that England was fired for having engaged in union activities while part of management; that dual-rated floormen "were part of management" and, when dealing, still supervisors; that management had been considering abolishing the dual-rated classification, with floormen no longer having to deal; and that the floormen "should carry a pad of paper" so that they could note any disciplinary matters for future discussions involving employee evaluations. Also, Pederson did not deny requesting that the floormen not attend a future union meeting, stating that management knew the identity of union adherents, telling the floormen that they had authority to recommend various employee-related actions, and telling the floormen not to associate with union supporter Pete Boutmy or question employees about the signing of union cards.

Counsel for the General Counsel argues that Pederson violated Section 8(a)(1) of the Act at this meeting by informing the other floormen that England had been discharged because of his union activities, warning employees not to discuss the Union or attend union meetings, advising employees not to speak to known union adherent Boutmy, creating the impression of surveillance of union activities by stating that management knew the identities of union supporters, and by attempting to convert employees into supervisors by granting floormen enhanced authority. Without arguing the legality of any particular comment, Respondent bases its assertion that Pederson committed no unfair labor practices during the meeting on its argument that floormen are statutory supervisors and that Pederson acted under this understanding[15] when speaking to the floorman on April 19. Contrary to Respondent, I have previously concluded that its floormen are not supervisors within the meaning of the Act; however, such a finding, alone, does not resolve the legality of Pederson's remarks.

Initially, I note that the Board has taken contrary positions in cases wherein employers, who are acting under the mistaken belief that listeners are statutory supervisors, make otherwise coercive and unlawful statements to said individuals. In *Answering, Inc.*, 215 NLRB 688, 689 (1974), the Board adopted the findings of an administrative law judge who concluded that an employer's good faith but mistaken "presents no valid defense against alleged 8(a)(1) violations since, as 'employees,' [the individuals] were protected by the provisions of Section 7 of the Act . . . ." Contrast this rationale with the Board's decision in *Cato Show Printing Co.*, 219 NLRB 739, 740 (1975), wherein the Board, with Members Fanning and Jenkins dissenting on this point, concluded that, "in view of Respondent's honest belief that the working foremen and floorladies were supervisors," statements, including admonishments not to discuss the union with other employees and instructions to engage in surveillance of union activities, to said individuals did not violate Section 8(a)(1) of the Act. With the state of the law mired in this seemingly irreconcilable quagmire, it appears to me that some middle ground must be found which takes into account the equally important rights of employees and employers. Thus, guidelines must be utilized which balance the Section 7 rights of employees against an employer's equally important obligation to restrain its supervisors and ensure that they do not engage in conduct disruptive of the protected concerted activities of employees. In this regard, if, as the Board does, an employer will be found responsible for the acts and conduct of its supervisors, the employer must be able to educate and explicate for supervisors what they are able or forbidden to do in the employer's interests. What is especially compelling herein is that much of what Pederson said at this meeting was in this vein, and that his remarks were directed at individuals who, under recent Board precedent, were Respondent's supervisors.

What sort of a balancing test would be most efficacious in protecting the aforementioned significant rights of employers and employees in circumstances such as herein involved? It is suggested that, where the employer's otherwise unlawful statements are directed toward its legitimate interest in avoiding a collision between the duties and responsibilities of its supervisors and the Section 7 rights of employees, the "coercive" effect of the comment is outweighed by said employer interest, and the comment would not be violative of the Act. However, where the employer's comments can only serve to

[12] Hines testified that he has been aware of his authority to recommend the hiring and firing of dealers since the day he was promoted to a floorman position. At that time, Frank Marinageli, the day-shift club manager, told him that he would be able to recommend raises, firings, discipline, and other employee actions.

[13] According to Hines, this request was not new. Thus, when promoted to floorman by Marinageli, the latter "said you should keep a pad and write the good and bad things about the dealers." Kathy Trupp corroborated Hines on this point, testifying that she received a similar instruction when she was promoted to her dual-rated floorman position.

[14] Regarding the Boutmy comment, when examined as to whether Pederson made such a statement, Hines testified that he had no present recollection of such a statement. When shown his pretrial affidavit, which contains the comment and attributes it to Pederson, Hines averred that his memory was better at the time of his affidavit. In any event, as will be pointed out, Pederson did not deny the statement.

[15] Inasmuch as the Region had previously alleged that floormen were supervisors and as the Board had found unfair labor practices were committed by said individuals (*Harvey's Hotel*, 234 NLRB 152 (1978)), it could hardly be said that Pederson's understanding was not a reasonable one.

impinge on the Section 7 rights of the alleged supervisors—and, in effect, all other employees—and do not relate to the employer's legitimate goal of avoiding the commission of unfair labor practices, the coercive effect of the statements is irreparable and more significant than any employer interests and would be violative of Section 8(a)(1) of the Act. Applying these standards to Pederson's remarks at the April 19 meeting, I initially note that Pederson conducted it, honestly believing that his listeners were Respondent's supervisors and that one explicit purpose for the meeting was to discuss the nascent union organizing campaign. Also, while I do not believe that the overall context of the meeting either was intended to be or was, in fact, coercive, I conclude that, under the aforestated guidelines, certain of Pederson's remarks, even if uttered, in good faith,[16] could have served only to coerce and restrain the floormen—and all other employees—in the exercise of their Section 7 rights.

At the outset, I agree with counsel for the General Counsel that, by affirming for his audience that one of their fellow floormen, England, had been terminated for supporting and aiding the Union, Pederson violated Section 8(a)(1) of the Act. *Tufts Bros.*, 235 NLRB 808, 818 (1978). This remark served only to remind the floormen of the consequences for engaging in similar activities and would, in no conceivable way, foreclose potential unfair labor practices. Next, Pederson did not deny telling the floormen not to be seen speaking to known union supporter Boutmy. I fail to see how any legitimate employer interest could be served by such a prohibition. Rather, such an "instruction"—just as the England comment—has the overriding effect of coercing and intimidating employees from freely exercising their Section 7 rights and is violative of Section 8(a)(1) of the Act. *Tennessee Cartage Co.*, 250 NLRB 112 (1980). Also, Pederson did not deny informing the floormen that management was aware of the identities of the union supporters. Such a comment has traditionally been held to unlawfully create, in the minds of employees, the impression that their employer is engaging in surveillance of their union activities. *Magnesium Casting Co.*, 250 NLRB 692 (1980); *Pilgrim Life Insurance Co.*, 249 NLRB 1228 (1980). Herein, I fail to perceive how said statement may have averted potential unfair labor practices or served any other legitimate employer interest and find that Pederson thereby violated Section 8(a)(1) of the Act.

Contrary to counsel for the General Counsel, I do not believe that Pederson otherwise violated Section 8(a)(1) by his comments at this meeting. Thus, while Pederson did not deny instructing the assembled floormen not to interrogate employees regarding "signing up" with the Union and not to attend a scheduled union meeting in order to avoid allegations of spying, I believe these comments represent nothing more than an effort by Respondent to avoid potential unfair labor practices. Notwithstanding the coercive effect, if any, of Pederson's instructions, it would appear that Respondent's right—and perhaps its obligation—to prevent the commission of unlawful acts is transcendent in this instance; thus, Pederson's remarks were in furtherance of the policies of the Act. It is also asserted that Pederson violated Section 8(a)(1) of the Act by conferring on floormen the right to recommend the hiring and firing of employees—authority which they previously did not possess. While Pederson did not deny discussing these powers, I credit the testimony of Michael Hines that floormen already were permitted to make such recommendations[17] and that Pederson was merely reiterating and reminding the floormen of their authority. Accordingly, I do not believe that Pederson violated Section 8(a)(1) of the Act by any of the aforementioned comments and shall recommend that paragraphs 7(a)(2) and (5) of the complaint be dismissed.

D. *Respondent's Maintenance of a No-Distribution/No-Solicitation Rule*

Paragraph 6 of the complaint alleges that, at all times material herein, Respondent has maintained and enforced a no-distribution/no-solicitation rule which is violative of Section 8(a)(1) of the Act. In support, former employee Victor Pieter Boutmy testified that he first became aware of the existance of such a rule in April when informed by another employee that a no-distribution/no-solicitation rule was posted on the bulletin board which is located in the cafeteria. The rule was typed on a piece of stationery, with Respondent's letterhead at the top; was dated September 20, 1978; and was signed by Eldon Campbell, Respondent's president. According to Boutmy, "The piece of paper looked like it had been there a while. It had some holes in it, thumb tack holes I would say. They moved it around as they posted new bulletins." Boutmy recalled the following as the rule printed thereon:[18]

> Solicitation of any kind during working hours and/or time is prohibited. . . . The distribution of literature during working time and/or [working] area is prohibited and . . . that distribution and solicitation by non-employees or off-duty employees upon the premises of [Respondent] is also prohibited. . . . [V]iolation of the above rules . . . could result in disciplinary action . . . including termination.

During cross-examination, Boutmy stated that he distributed union "pledge" cards to employees in the cafeteria during break periods, that he was never disciplined for—or warned about—engaging in such activities, and that management officials possibly were in the cafeteria when he distributed cards.

Respondent offered no testimony or evidence to controvert that of Boutmy. Rather, conceding that Respondent does, indeed, maintain a no-distribution/no-solicitation rule, counsel for Respondent points to its employee manual, General Counsel's Exhibit 2, and argues that the

[16] The Supreme Court has ruled that "prohibited conduct cannot be excused by a showing of good faith." *Ladies Garment Workers v. NLRB*, 366 U.S. 731, 739 (1961).

[17] While I believe that floormen possessed authority to recommend such employee actions, it is another matter whether such recommendations were "effective."

[18] Former employee James Ledbetter corroborated Boutmy that such a rule was posted but he could not recall its contents.

rule therein is the only such rule governing employee solicitations and distributions.[19] As to the testimony of Boutmy, counsel for Respondent merely states that there is no evidence that the rule, as set forth by Boutmy, was ever implemented or enforced during the 10(b) period. Inasmuch as his testimony was uncontroverted, I credit the testimony of Boutmy and find that, notwithstanding whatever rule is published in the employee handbook, a no-distribution/no-solicitation rule, as set forth by Boutmy, was published and maintained by Respondent and posted on the cafeteria bulletin board in April—within the 10(b) period.

Counsel for the General Counsel argues that the rule is unlawful in two aspects. Initially, with regard to the prohibition against solicitation "during working hours," she argues that such renders the rule violative of Section 8(a)(1) of the Act. In *Essex International, Inc.*, 211 NLRB 749 750 (1974), the Board concluded that "a rule prohibiting solicitation during 'working hours' is *prima facie* susceptible of the interpretation that solicitation is prohibited during all business hours . . . ." Accordingly, unless the impact on employees' lunch and break periods is clarified by the employer, such broad language is "unduly [restrictive of] employees' rights under Section 7 of the Act to engage in union solicitation or distribution during their nonworking time, and the rule would be invalid and violative of Section 8(a)(1) of the Act. Id. at 750; *Pyromatics, Inc.*, 251 NLRB 1017 (1980). Herein, there is no evidence that Respondent ever explained to employees that solicitations were permissible during lunch or break periods. Moreover, while Boutmy admittedly did distribute cards during such periods, there is no specific evidence that Respondent was aware of such activities. Next, counsel for the General Counsel argues that the stated prohibition against off-duty employee solicitations and distributions on Respondent's premises also renders the rule invalid. In *Mandarin*, 221 NLRB 264 (1975), the Board considered an almost identical no-solicitation rule and concluded that such was "presumptively invalid and unlawful" inasmuch as the rule solely concerned off-duty employees soliciting on the employer's property, while they were allowed to remain on its premises for other reasons. Likewise, the instant rule prohibits only off-duty employee solicitations and distributions on Respondent's property. Presumably, employees may spend as much of their off-duty time in Respondent's public areas as they desire and for any reason. Accordingly, I agree with counsel for the General Counsel that Respondent's no-solicitation/no-distribution rule is presumptively invalid and violative of Section 8(a)(1) of the Act.[20]

[19] Said rule reads as follows:

> Solicitation of any type by employees during working time is prohibited. Distribution of literature of any type or description by employees during working time is prohibited. Distribution of literature of any type or description in working areas is prohibited. Violation of any of the above rules will result in immediate disciplinary action, and may include termination.

[20] Respondent argues that, absent evidence that the no-distribution/no-solicitation rule was enforced, there can be no finding that such is violative of the Act. However, the Board has held that, once an employee rule is shown to be unlawful on its face, the General Counsel need not establish that the rule was enforced. *Blue Cross-Blue Shield of Alabama*, 225 NLRB 1217, 1219–1220 (1976). *Great Atlantic & Pacific Tea Co.*, 162 NLRB 1182, 1184 (1967).

E. *Remaining 8(a)(1) Allegations*

There are two remaining unfair labor practice allegations in the complaint. The first involves Club Shift Manager David Pederson. According to former employee James Ledbetter, Pederson had a short conversation with him 1 or 2 days after Robert England's termination near the Hotel's gift shop at approximately 8 p.m. Ledbetter testified, "There wasn't anything said by me. The only thing Mr. Pederson said was if I didn't stop that union shit, I'd be out in the street with Bob England." Pederson walked away before Ledbetter could reply. On cross-examination, the latter admitted that the foregoing was the only conversation he had had with Pederson in his 15 years of employment and that "I'm sure he didn't even know I was there." Pederson denied the occurrence of the incident, and I credit his denial. Thus, by virtue of his demeanor while testifying, Ledbetter did not impress me as being a particularly candid witness. Further, I find it rather unlikely, taking into account Ledbetter's admission, that Pederson would issue a threat to a person to whom he had never spoken and with whom he was not acquainted. Accordingly, I shall recommend that paragraph 7(b) of the complaint be dismissed.

The second alleged violation of the Act concerns one or two conversations between Ledbetter and Games Manager William E. Briggs. According to Ledbetter, he had two conversations with Miller during the union organizing campaign in the spring of 1980. In the first, Briggs said that "one of the reasons that the union wanted to organize was because they were going broke and they needed [our] money . . . ." Ledbetter then testified that, in their second conversation, Briggs "mentioned that even if we did get a union, that we'd go on strike because Harvey's wasn't going to give us anything." During cross-examination, regarding Briggs' latter comment, Ledbetter testified that Briggs said the Union would have to win an election before Respondent would negotiate, that even if the Union won, everything would have to come from negotiations, that if Respondent did not give in, the Union would have to strike or walk away, and that Respondent would not give anything away. Not only did Briggs admit engaging in such a conversation with Ledbetter but he also admitted the substance and the tone thereof: "On one occasion they were discussing contracts and at that time I said that in the event that a union was voted in that they would have to start from scratch and negotiate a complete contract with management." Without regard to credibility, reading the accounts of Ledbetter and Briggs together, it is clear that by warning that bargaining would start from "scratch" or that "everything" comes from negotiations, Briggs indicated that any collective bargaining would be futile and that it would even be futile for the employees to select the Union as their collective-bargaining representative. Such conduct was clearly violative of Section 8(a)(1) of the Act. *Conagra, Inc.*, 248 NLRB 609, 612 (1980).

CONCLUSIONS OF LAW

1. Respondent, Harvey's Wagon Wheel, Inc., d/b/a Harvey's Resort Hotel and Harvey's Inn, is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By terminating employee Robert England on or about April 18, 1980, and thereafter not reinstating him, because he engaged in union or other protected concerted activities, Respondent interfered with, restrained, and coerced employees in the exercise of the rights guaranteed by Section 7 of the Act and, thereby, committed unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act.

4. By maintaining in effect an invalid no-solicitation/no-distribution rule; by informing employees that another employee was terminated for having engaged in union activities; by instructing employees not to speak to union adherents; by informing employees that it was aware of the identities of union supporters; and by warning employees that bargaining would start from scratch and that "everything" would come from negotiations, Respondent interfered with, restrained, and coerced employees in the exercise of the rights guaranteed by Section 7 of the Act and, thereby, committed unfair labor practices within the meaning of Section 8(a)(1) of the Act.

5. These unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

6. Unless specifically found herein, Respondent committed no other unfair labor practices.

REMEDY

Having found that Respondent engaged in unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. As I found that Robert England was not a supervisor within the meaning of Section 2(11) of the Act and that, therefore, his discharge was violative of the Act, I shall recommend that Respondent be ordered to offer him immediate and full reinstatement to his former position or, if that job no longer exists, to a substantially equivalent position without prejudice to his seniority or other rights and privileges. I shall further recommend that Respondent be ordered to make him whole for any loss of earnings he may have suffered as a result of the discrimination againat him by payment to him of the amount he normally would have earned from the date of his termination, April 18, 1980, with backpay to be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as prescribed in *Isis Plumbing Co.*, 138 NLRB 716 (1962), and *Florida Steel Corp.*, 231 NLRB 651 (1977). Furthermore, in view of the Board's remedy in the prior unfair labor practice case, reported at 234 NLRB 152, 154, the nature of the unfair labor practices therein, and noting the serious nature of the unfair labor practices therein, I believe a broad cease-and-desist order is necesaary to remedy Respondent's unfair labor practices. *Edward A. Utlaut Memorial Hospital*, 249 NLRB 1153 (1980); cf. *Hickmott Foods*, 242 NLRB 1357 (1979). Finally Respondent shall post a notice to employees, setting forth the aforementioned unfair labor practices and remedies.

[Recommended Order omitted from publication.]